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No. 85-493

In the Supreme Court of the United States

OCTOBER TERM, 1985

NEVILLE J. REEHLMAN, PETITIONER

v.

A. J. MCNAMARA, JUDGE,
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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TABLE OF AUTHORITIES

Page

Cases:

Cheff v. *Schnackenberg*, 384 U.S. 373 3

Douglass v. *First National Realty Corp.*, 543 F.2d 894 3

Gompers v. *Bucks Stove & Range Co.*, 221 U.S. 418 4

Muniz v. *Hoffman*, 422 U.S. 454 3

Shakman v. *Democratic Organization*, 533 F.2d 344, cert. denied, 429 U.S. 858 4

Shillitani v. *United States*, 384 U.S. 364 ..... 3, 4

United States v. *Asay*, 614 F.2d 655 4

United States v. *United Mine Workers*, 330 U.S. 258 4

Miscellaneous:

3 C. Wright, *Federal Practice and Procedure* (1982) 4

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Petitioner contends that the evidence does not support his adjudication of contempt and that the fine imposed was excessive.

1. Petitioner, an orthopedic surgeon, was scheduled to appear at the trial of a personal injury case brought against Gulf Oil Corporation by one of his patients, Rex Hesler. The trial, originally set to begin on February 27, 1984, was rescheduled to Monday, August 20, 1984. On April 10, 1984, Hesler's attorney sent petitioner a letter advising him of the August 20 trial date. On July 13, 1984, he wrote a second letter to petitioner reminding him of the August 20 date and indicating that a subpoena would be forthcoming. On August 8, 1984, petitioner was in fact served with a subpoena. Pet. App. A2-A3.

On August 16, 1984, the Thursday prior to the scheduled trial date, petitioner informed his office staff that he was going to Spain for a vacation. He left the next day without making any attempt to be excused from complying with the subpoena. The district court and the parties to the litigation did not learn that petitioner had gone to Spain until after the jury had been empanelled on August 20. Pet. App. A3.

The district court then issued an order directing petitioner to appear before the court on September 7, 1984, to show cause why he should not be held in contempt. Petitioner's defense at the hearing was that he had assumed that the lawsuit had been settled or continued because he had called the receptionist at Hesler's attorney's office on Friday morning to notify counsel of his vacation plans and no one had returned his call before he left for Spain at 1:00 that afternoon. See Pet. App. A3; Pet. 3. The district court found petitioner in contempt and ordered him to pay sums totalling $14,506.98 to the Clerk of the District Court (for jury costs), Rex Hesler, and Hesler's attorneys. See Pet. App. A1.

The court of appeals affirmed (Pet. App. A2-A4; 763 F.2d 670). It held that there was sufficient evidence in the record to support the district court's finding of contempt and that the fine imposed on petitioner was not excessive.

2. The decision of the court of appeals is correct, creates no conflict among the circuits, and presents no issue of significance. Accordingly, further review by this Court is not warranted.

a. There was ample evidence in the record to support a finding of contempt. Petitioner admits that he received two letters and a subpoena informing him of the trial date. Nonetheless, only two working days prior to the day trial was scheduled to begin he told his staff that he was leaving the country. He did not inform the court or make any effort

to inquire of the court about the scheduling of the trial. Petitioner's office manager did call Hesler's attorney on the Friday preceding the trial, but only to inform him that petitioner would be in Spain on the trial date (Tr. 11). These facts, particularly when considered in conjunction with petitioner's statements likening subpoenas to junk mail and confetti (Tr. 30), provided the district court with a sufficient basis to reject petitioner's claim that his absence was due to a "miscommunication" and hold him in contempt.

b. Petitioner contends that the fine imposed by the district court was excessive, arguing that he should not have been fined more than $500 for contempt when he was not afforded a jury trial. This contention is without merit.

In view of the remedy ordered by the district court, the contempt proceedings here are appropriately characterized as civil, rather than criminal. There is no right to a jury trial in civil contempt proceedings. *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).[1] That the lower courts labelled the contempt proceedings against petitioner "criminal" plainly is not dispositive. *Shillitani* v. *United States*, 384 U.S. 364, 369 (1966).[2] Nor is it dispositive that the court's order may

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[1]For this reason, the cases relied upon by petitioner (Pet. 9-11) to support the proposition that there is a $500 limit on contempt fines issued without a jury are inapposite. In those cases, either the sanction undoubtedly was criminal or else the court engaged in a preliminary inquiry and concluded that the case involved criminal, rather than civil, contempt. See *Douglass* v. *First National Realty Corp.*, 543 F.2d 894, 897-899 (D.C. Cir. 1976). Thus, this case presents no occasion for this Court to consider whether, in a non-jury trial, a fine in excess of $500 may be imposed upon an individual as a *criminal* sanction, irrespective of the wealth of the individual or the compensatory nature of the fine. Cf. *Muniz* v. *Hoffman*, 422 U.S. 454 (1975) (jury not necessary to impose $10,000 fine on labor union).

[2]The district court did view the proceeding as one for criminal contempt. The court of appeals apparently recognized that the sanction appeared to be civil in nature, but found it unnecessary to resolve that

be viewed as punitive by the contemnor, since that will almost invariably be true of any contempt sanction. This Court has explained that "'[i]t is not the fact of punishment but rather its character and purpose that often serve to distinguish' civil from criminal contempt." *Shillitani,* 384 U.S. at 369 (quoting *Gompers* v. *Bucks Stove & Range Co.,* 221 U.S. 418, 441 (1911)).

Where, as here, a contempt fine is in the nature of restitution—to compensate those harmed by the contemnor's actions—the contempt is civil in nature. See generally *United States* v. *United Mine Workers,* 330 U.S. 258, 303-304 (1947); *United States* v. *Asay,* 614 F.2d 655, 658-659 (9th Cir. 1980); *Shakman* v. *Democratic Organization,* 533 F.2d 344, 349-350 (7th Cir.), cert. denied, 429 U.S. 858 (1976). See generally 3 C. Wright, *Federal Practice and Procedure* § 704, at 823-828 (1982). In this case, the district court considered the actual costs incurred by those affected by petitioner's failure to appear, and petitioner's fine was based directly on these costs (see Tr. 35-36). As the court of appeals correctly noted (Pet. App. A4), "[i]t will be an unusual case in which fines fixed in such a manner will be found excessive."[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
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question. It operated on "the *assumption* that the proceeding was a criminal one, despite the secondary remedial purpose of the order" (Pet. App. A3 (emphasis added)).

[3]Although petitioner asserts that the fine was "excessive," he does not suggest that it was any greater than necessary to compensate the recipients for the damage caused them by petitioner's failure to comply with the subpoena.